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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 XAVIER LUMAR J'WEIAL,

12 Petitioner,

13 v.

14 PATRICK COVELLO,

15 Respondent.  
16  
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No. 1:20-cv-01478-NONE-EPG-HC

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS, DISMISSING  
PETITION FOR WRIT OF HABEAS  
CORPUS, DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT JUDGE AND CLOSE  
CASE, AND DECLINING TO ISSUE A  
CERTIFICATE OF APPEALABILITY

(Doc. No. 9)

18 Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus  
19 pursuant to 28 U.S.C. § 2254. On November 4, 2020, the magistrate judge issued findings and  
20 recommendations recommending that the petition be dismissed as an unauthorized second or  
21 successive petition. (Doc. No. 9.) The findings and recommendations were served on petitioner  
22 and contained notice that any objections thereto were to be filed within thirty (30) days of the date  
23 of service. (*Id.* at 3.) On January 7, 2021, after receiving a thirty-day extension of time to do so,  
24 petitioner filed objections to the findings and recommendations.<sup>1</sup> (Doc. No. 12.)  
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26 <sup>1</sup> On the same day he filed his objections, petitioner also filed a notice of appeal with the Ninth  
27 Circuit. (Doc. No. 13.) However, the notice of appeal was filed before the undersigned had  
28 adopted or rejected the findings and recommendations, and accordingly, the Ninth Circuit  
dismissed the appeal for lack of jurisdiction. (Doc. No. 16 (stating the magistrate judge's  
findings and recommendations are not appealable).)

1           Petitioner’s objections for the most part simply reiterate his challenges to his 2001  
2 convictions and sentence. (*See id.* at 1–7.) Regarding the magistrate judge’s specific finding that  
3 petitioner had made “no showing that he has obtained prior leave from the Ninth Circuit to file his  
4 successive petition,” (Doc. No. 9 at 3), petitioner asserts the following:

5                     The Magistrate errors in the finding that petitioner had not filed an  
6 [sic] request for leave when in fact Aug[ust] of 2020, petitioner did  
7 file a Notice of Appeal #3 times. For some reason there was a  
misunderstanding as to what I was request[ing] on appeal as to what  
case # petitioner was wanting to appeal.

8 (Doc. No. 12 at 7.) As explained by the magistrate judge, however, “this Court must dismiss any  
9 second or successive petition unless the Court of Appeals has given a petitioner leave to file the  
10 petition because a district court lacks subject-matter jurisdiction over a second or successive  
11 petition.” (Doc. No. 9 at 2 (citing *Burton v. Stewart*, 549 U.S. 147, 157 (2007)).) Despite the  
12 number of times petitioner may have filed a notice of appeal, petitioner has yet to demonstrate  
13 that he has actually sought and obtained leave from the Ninth Circuit to file his successive  
14 petition. Such permission can only be granted by the Ninth Circuit (not this court) upon its  
15 determination that petitioner “has made a *prima facie* showing that his application satisfies the  
16 requirements outlined” in 28 U.S.C. § 2244(b)(2)(A)–(B). *Jones v. Ryan*, 733 F.3d 825, 842 (9th  
17 Cir. 2013).

18           In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the court has conducted a  
19 *de novo* review of the case. Having carefully reviewed the entire file, including petitioner’s  
20 objections, the court holds the findings and recommendation to be supported by the record and  
21 proper analysis.

22           Having found that petitioner is not entitled to habeas relief, the court now turns to whether  
23 a certificate of appealability should issue. A petitioner seeking a writ of habeas corpus has no  
24 absolute entitlement to appeal a district court’s denial of his petition, and an appeal is only  
25 allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); 28 U.S.C.  
26 § 2253. Where, as here, the court denies habeas relief on procedural grounds without reaching  
27 the underlying constitutional claims, the court should issue a certificate of appealability “if jurists  
28 of reason would find it debatable whether the petition states a valid claim of the denial of a

1 constitutional right and that jurists of reason would find it debatable whether the district court was  
2 correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain  
3 procedural bar is present and the district court is correct to invoke it to dispose of the case, a  
4 reasonable jurist could not conclude either that the district court erred in dismissing the petition or  
5 that the petitioner should be allowed to proceed further.” *Id.*

6 In the present case, the court finds that reasonable jurists would not find the court’s  
7 determination that the petition should be dismissed as an unauthorized second or successive  
8 petition to be debatable or wrong, or that petitioner should be allowed to proceed further.  
9 Therefore, the court declines to issue a certificate of appealability.

10 Accordingly:

- 11 1. The findings and recommendation issued on November 4, 2020 (Doc. No. 9) are  
12 adopted;
- 13 2. The petition for writ of habeas corpus is dismissed;
- 14 3. The Clerk of Court is directed to assign a district judge to this case for the purpose of  
15 closing the case and then to close the case; and
- 16 4. The court declines to issue a certificate of appealability.

17 IT IS SO ORDERED.

18 Dated: **April 30, 2021**

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UNITED STATES DISTRICT JUDGE